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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1404

RALPH P. COUNSELMAN, PETITIONER

v.

**EARL W. CLARK, DIRECTOR, LIQUIDATION DIVISION,
DEPARTMENT OF COMMERCE**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES EMERGENCY COURT OF APPEALS**

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 229-233) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on April 23, 1947 (R. 234). The petition for a writ of certiorari was filed on May 23, 1947. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. (Supp. V) 924 (d)).

making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether the United States Emergency Court of Appeals, in a proceeding brought under Section 204 (e) of the Emergency Price Control Act of 1942, as amended, abused its discretion in denying petitioner's motion, filed out of time, for leave to subpoena and examine certain named Office of Price Administration officers and employees.

STATUTE INVOLVED

The statutory provisions involved are contained in Section 204 of the Emergency Price Control Act of 1942, as amended, Appendix, *infra*, pp. 8-12.

STATEMENT

On April 5, 1943, petitioner was indicted in the District Court of the United States for the District of Columbia for violations of a regulation issued by the Price Administrator pursuant to the Emergency Price Control Act of 1942, as amended, and, after entering a plea of guilty, petitioner was sentenced on March 1, 1946, to pay a fine of \$4,300¹ (R. 177).

¹ From the figures submitted by petitioner, the extent of his black market operations—the difference between his actual net sales figures and his net sales computed at the applicable ceiling prices established by the regulation—during the period involved in the indictment, amounted to \$74,146.39 (R. 9).

On April 4, 1946, petitioner's complaint was properly filed in the Emergency Court of Appeals pursuant to Section 204 (e) of the Act (R. 177). On May 9, 1946, petitioner filed with the Court an application for leave to introduce evidence (R. 191). By order of the Court dated May 27, 1946, petitioner's application was granted in part, and he was directed to present the evidence, so far as practicable in affidavit form, to the Administrator, together with such other evidence as the Administrator deemed it necessary or proper to receive (R. 196).

Accordingly, on June 10, 1946, the Administrator entered an order for the introduction of evidence by leave of court (R. 1). On July 11, 1946, petitioner filed with the Court a motion for an order requiring the Administrator to produce various materials (R. 197). On July 19, 1946, the Administrator filed his objections to the motion with an accompanying memorandum (R. 200-210), stating that he would furnish the petitioner with all the evidence material to petitioner's case which was in his possession and control, but that petitioner "was informed prior to the filing of the motion that the information presently requested was not available" (R. 201). On July 24, 1946, the Court entered an order denying the motion (R. 211).

On August 2, 1946, petitioner filed his evidence with the Administrator (R. 6-27, 50-134). On August 28, 1946, the Administrator entered an

order providing petitioner with an opportunity to present further evidence (R. 29), and by orders entered on September 5, 1946 (R. 30), and September 23, 1946 (R. 31), petitioner's time to file this evidence was extended to October 1, 1946. A further extension of time was denied by an order entered on October 16, 1946 (R. 32).²

On November 6, 1946, the Administrator filed with the Court the transcript of the proceedings before him (R. 49). The evidential record was then closed for, under Rules 21 and 22 of the Rules of the Emergency Court, the time for the filing of petitioner's brief commenced to run. 50 U. S. C. App. (Supp. V), fol. 924. On November 19, 1946, petitioner filed with the Court his motion for leave to subpoena and examine certain named witnesses, all of whom either then were, or had been, officers and employees of the Office of Price Administration (R. 214).

On November 27, 1946, the Administrator filed his answer to this motion asserting that: (1) "the motion is dilatory and has been filed out of time for the sole purpose of delaying this proceeding;" (2) the testimony of the requested witnesses was unnecessary to the proper disposition of the case; and (3) the testimony was both privileged and immaterial (R. 217-218).

² The uncontested reasons for this denial appear in the opinion accompanying this order (R. 33-34).

On December 5, 1946, the Court entered an order denying the motion (R. 219), and on December 20, 1946, the Court denied petitioner's motion for reconsideration (R. 225).

The case was ultimately briefed and argued on the merits, and on April 23, 1947, the Court handed down its opinion upholding the validity of the regulation (R. 225-233), and entered judgment dismissing petitioner's complaint (R. 234).

ARGUMENT

As drawn, the instant petition purports to raise interesting, but unfortunately only academic, constitutional issues concerning the right of an individual to secure compulsory process from the Emergency Court of Appeals to substantiate contentions as to the invalidity of a regulation. The question actually presented on this record, however, merely concerns an exercise of discretion by the court below, and, as disclosed conclusively by the record, that court did not abuse its discretion in denying petitioner's motion for leave to subpoena and examine certain named witnesses.³

³ Petitioner also contends that the court below erred in denying his motion to produce "certain information in the possession and control of the respondent" (Pet. 2). But the petitioner was furnished with all of the requested information within the possession and control of the Administrator (R. 37-41, 43-46); the Administrator denied that the balance of the requested information was available; and, in denying the motion, the court in effect made a finding in the Administrator's favor on the latter controverted point. Ob-

Petitioner's motion was filed long out-of-time (R. 218) and after the evidential record had been closed. Respondent opposed it as a dilatory motion, and its very consideration fell within the discretion of the court.* Moreover, the opinion testimony sought under petitioner's motion was unnecessary to a determination of the validity of the regulation since the official economic and statistical data introduced by the petitioner himself (R. 10, 50-134) could and did furnish an adequate factual basis for that determination (R. 231-232). Finally, and in any event, the testimony of the named Office of Price Administration personnel whom petitioner desired to subpoena was both privileged and immaterial.⁵

CONCLUSION

The decision below is correct, and there is no warrant for review of the questions presented by

viously, then, there was no error in denying a motion to compel the Administrator to produce immaterial or irrelevant evidence, or information not within his possession and control.

*See *supra*, p. 4.

⁵ The Administrator's staff may not be examined with respect to their personal knowledge, determinations, or mental operations in arriving at the administrative regulation under review, and their opinions as to the validity of that regulation are irrelevant. See, e. g., *Chicago Burlington & Quincy Ry. Co. v. Babcock*, 204 U. S. 585, 593; *United States v. Morgan*, 313 U. S. 409, 422.

the petition. The petition should therefore be denied.

Respectfully submitted.

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JUNE 1947.

APPENDIX

Section 204 of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. (Supp. V) 924, provides in part:

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant

in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a

clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in

any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.